

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Civ. No. 04-)
)
THE STATE OF NEW JERSEY;)
James E. McGreevey, Governor of)
the State of New Jersey;)
James Davy, Commissioner,)
Department of Human Services;)
James W. Smith, Jr., Director,)
Division of Developmental Disabilities;)
Jeffrey Schroeder, Chief)
Executive Officer,)
New Lisbon Developmental Center,)
)
Defendants.)
)
)

A. General Provisions

1. This Settlement Agreement (the "Agreement") is entered into between the United States and the State of New Jersey; Department of Human Services, Division of Developmental Disabilities; and New Lisbon Developmental Center ("the State").
2. The Agreement resolves the investigation conducted by the United States Department of Justice ("DOJ") at the New Lisbon Developmental Center ("New Lisbon") pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. §1997. The Agreement addresses the corrective measures set forth by

DOJ in its April 8, 2003 letter to the State. This Agreement does not serve as an admission by the State that corrective measures are necessary to meet the constitutional and statutory rights of the residents of New Lisbon or any other developmental center operated by the State.

3. In conformity with CRIPA, this Agreement represents a voluntary effort by the State to meet the concerns raised by DOJ's investigation. See 42 U.S.C. §1997b(a)(2)(B) and §1997g.
4. Pursuant to 42 U.S.C. §1997b(a)(2)(B) and §1997g, the United States agrees it shall assist the State in identifying source(s) of federal funding to implement the entirety of the remedial measures set forth in Section D of this Agreement.
5. Nothing in this Agreement shall be construed as an acknowledgment, an admission, or evidence of liability of the State under CRIPA, the Constitution or federal or state law and this Agreement may not be used as evidence of liability in this or any other civil or criminal proceeding.
6. The signatures below of officials representing the United States and the State signify that these parties have given their final approval to this Agreement.
7. This Agreement is enforceable only by the parties and is binding upon the parties, by and through their officials, agents, employees, and successors. No person or entity is intended to be a third party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no person or entity may assert any claim or right as a beneficiary or protected class under this Agreement in any civil, criminal, or administrative action. Similarly, this

Agreement does not authorize, nor shall it be construed to authorize, access to State documents by persons or entities not a party to this Agreement.

8. Nothing in this Agreement is intended to alter the existing collective bargaining agreements between the State and employee bargaining units or impair the collective bargaining rights of employees in those units under state and local law.
9. This Agreement shall constitute the entire integrated Agreement of the parties. No prior contemporaneous communications, oral or written, or prior drafts shall be relevant or admissible for purposes of determining the meaning of any provisions herein in any litigation or any other proceeding.
10. All parties shall bear their own costs, including attorney fees, in this and any subsequent proceedings.
11. The parties agree it is in their mutual interests to avoid litigation. To that end, the parties have resolved their differences by agreeing upon provisions contained in this Agreement. The parties agree that resolution of this case is in the best interests of New Lisbon residents. Now, therefore, pursuant to Fed. R. Civ. P. 41(a), the parties hereby agree to file in the United States District Court for the District of New Jersey, the Vicinage of Trenton, this Agreement, together with a Complaint and a notice to conditionally dismiss the Complaint under the conditions set forth in this Agreement. The parties further agree that this case will remain on the Court's inactive docket, during the term of and subject to this Agreement, and that, from time to time, the Court may hold, at the request of either party, status conferences to informally resolve disputes between the parties, if any, until this Agreement terminates.

12. This Agreement shall take effect on the day it is filed with the United States District Court, Vicinage of Trenton.

B. Definitions

1. “Section” shall mean one of the portions of this Agreement, including but not limited to the following: Protection from Harm; Psychological and Behavioral Services; Restraints; Psychiatric Care; Habilitation; Health Care; Nutritional and Physical Management and Therapy Services; and Community Placement.
2. “Substantial Compliance” shall mean that the State is complying with the material requirements of section D and that substantial compliance has occurred for a period of six months. Isolated incidents of non-compliance shall not preclude a finding of substantial compliance. In determining whether the State has substantially complied with the sections of this Agreement, the Monitor and the United States shall take into account the fact that CRIPA requires patterns or practices of resistance by the State to the full enjoyment of the rights, privileges, or immunities secured or protected by the Constitution or laws of the United States of the residents of New Lisbon.
3. Any reference in this Agreement to “New Lisbon” taking certain action implies that all of the Defendants are responsible for New Lisbon’s compliance.
4. In all instances in this Agreement in which the State agrees to provide care, treatment and services in keeping with “professional judgment” it shall mean that the State will provide care, treatment and services consistent with “professional judgment” as defined by Youngberg v. Romeo, 457 U.S. 307 (1982). To the extent any provision of this Agreement relating to the provision of care, treatment or services requires that

any action be taken or thing be done to a level of quality or in an amount that is not otherwise specified or quantified in the Agreement, that provision shall be interpreted consistent with "professional judgment" as enunciated in Youngberg. In particular, all qualifying terms used in this Agreement, including but not limited to "individualized needs," "adequate," "necessary" or "as needed" shall be interpreted to mean that level, quality, amount or timeliness of care, treatment or services that is consistent with "professional judgment" as enunciated in Youngberg.

5. "Significant incidents" shall include all instances of alleged, suspected or substantiated abuse, neglect, moderate or major injury, elopement, theft, hospitalization due to an injury, or unexpected death.

C. Voluntary Measures Adopted and Implemented by the State

1. Following an investigation in May and June 2002, the Attorney General of the United States, by and through the Assistant Attorney General, Civil Rights Division, informed the State on April 8, 2003, that the Attorney General had reasonable cause to believe that persons residing in or confined to New Lisbon were being subjected to conditions that deprived them of their legal rights secured by the United States Constitution and federal law.
2. The State reports it has:
 - a. reduced the incidents of assaults by a resident towards another resident from the four quarters preceding the DOJ's June 2002 investigation to the six quarters following the DOJ investigation by 48 percent;

- b. reduced the incidents of self-inflicted injuries by residents from the four quarters preceding the DOJ's June 2002 investigation to the six quarters following the DOJ investigation by 54 percent;
- c. established its own Incident Response Unit (IRU) as an independent investigative unit that is responsible for conducting all significant incident investigations. All of the IRU investigative staff are and will be trained by certified trainers and certified in conducting significant incident investigations;
- d. trained its current psychologists in behavior interventions that comport with accepted professional judgment, and is continuing its training efforts;
- e. reduced the use of mechanical restraints from the four quarters preceding the DOJ's June 2002 investigation to the six quarters following the DOJ's investigation by 83 percent;
- f. has decreased the use of large custom-padded helmets, to one instances as part of a behavior plan and to two instances for protection from seizure disorder;
- g. has increased its staffing allocation to three, full-time psychiatrists and two part-time psychiatrists to provide psychiatric treatment to the New Lisbon residents;
- h. has provided a psychiatric consultation for each resident with mental illness within the last year and will continue to do so at least annually unless more frequent follow up is clinically appropriate;

- i. has reduced the number of residents on more than two seizure medications to 7 residents;
 - j. has set standards for maintenance of client records, to ensure that it maintains an adequate, comprehensive record for each resident that comports with accepted professional judgment and includes current information with respect to the resident's care, medical treatment, training, protection, services, and supports and has implemented a system for making such records available in each cottage to ensure that staff utilize such records in making ongoing decisions for each resident; and
 - k. has increased its rate of community placements from New Lisbon, by placing 40 former residents into community placements in fiscal year 2003; and has placed or is in the process of placing 22 residents in community placements in fiscal year 2004.
3. The United States takes no position on the validity of the foregoing State assertions as the United States has not investigated the truth of the statements. The United States acknowledges the State's extensive cooperation and assistance given to the United States while it conducted its investigation. In light of the State's cooperation, the parties agree to resolve this matter by the terms set forth herein.

D. Efforts to Be Undertaken by the State

In order to achieve compliance with this Agreement, New Lisbon shall undertake the following:

1. Protection from Harm

- a. New Lisbon shall comply with the standards set forth in Youngberg, and therefore, shall provide a reasonably safe and humane environment for all New Lisbon residents.
- b. New Lisbon shall continue to ensure that all resident incidents and injuries are timely and appropriately documented and are available for review in a central location.
- c. New Lisbon shall continue to ensure appropriate and timely administrative review of all significant incidents. The administrative review shall identify individual and systemic issues raised by the significant incident, make recommendations to address the individual and systemic issues, and implement the recommendation to prevent future occurrences.
- d. New Lisbon shall continue to implement adequate policies and procedures with regard to conducting investigations of significant incidents and preparing adequate written reports.
- e. New Lisbon shall adequately train staff and independent investigators on how to implement the policies and procedures regarding conducting investigations of significant incidents and preparing adequate written reports.
- f. New Lisbon shall also continue to develop and implement a quality assurance program which tracks and analyzes trends of incidents and injuries so as to help prevent such incidents from occurring in the future. New Lisbon shall

timely implement adequate and appropriate remedial measures to address patterns or trends that are identified through the quality assurance program.

- g. New Lisbon shall impose discipline that is appropriate for the employees involved in substantiated cases of abuse or neglect, for employees who fail to report abuse or neglect, and for employees who provide materially false information during an investigation. The United States recognizes that the ultimate determination as to the appropriateness of any such discipline lies not with New Lisbon but is within the purview of the Merit System Board within the New Jersey Department of Personnel. Accordingly any discipline sought to be imposed by New Lisbon is subject to the appeal rights of employees as established in the statutes, regulations and case law governing the Merit System Board and further that the ability to discipline and take other action as deemed appropriate may be subject to the rights of New Lisbon's employees as established by union contracts.

2. Psychological and Behavioral Services

- a. New Lisbon shall provide its residents who have behavioral problems with an adequate behavioral assessment in order to determine the appropriate treatments and intervention for each person. This assessment shall be interdisciplinary, comport with professional judgment, and shall incorporate any conditions that may contribute to a person's behavior.
- b. New Lisbon shall provide adequate and appropriate training to the appropriate staff as to how to implement behavior programs and monitor that

implementation. New Lisbon shall certify that each staff member receiving such training has demonstrated the ability to implement the behavior program. The monitoring shall include the recording of appropriate behavioral data with regard to the person's progress in the program.

- c. New Lisbon shall implement the behavior plan for each resident and on an ongoing basis monitor the residents' progress in the programs and revise the programs when necessary to ensure that their behavioral needs are being met. This step shall also involve ongoing training for staff whenever a revision is required.

3. Restraints

- a. New Lisbon shall ensure that all mechanical, physical, and chemical restraints are used only pursuant to professional judgment, and are not used in lieu of adequate and appropriate behavior programs and interventions.
- b. New Lisbon will continue to review each use of mechanical, physical, and chemical restraint and determine whether the restraint could have been avoided. During the review, New Lisbon will determine whether staff are implementing the behavior program adequately and appropriately.
- c. New Lisbon shall monitor and track the use of all mechanical, physical, and chemical restraints. New Lisbon shall ensure that any reduction in the use of mechanical restraints is only replaced with the use of chemical restraints if the chemical restraints are used pursuant to professional judgment.

- d. New Lisbon shall fully document and track the use of personal control and implement strategies to limit the use of personal control to those that are required by professional judgment.
- e. New Lisbon shall ensure that all helmets are the least intrusive possible suited to meet the individualized needs of the resident. The requirements of (a), (b), and (c) of this Section concerning restraints are not applicable to helmets ordered by physicians as safety devices, however, New Lisbon agrees that the use of all helmets shall be tracked.

4. Psychiatric Care

- a. New Lisbon shall ensure that each resident at New Lisbon with mental illness is provided with a psychiatric assessment in accordance with accepted professional judgment.
- b. New Lisbon shall ensure each resident receiving psychotropic medication is assessed by a qualified psychiatrist at least annually and other residents with a mental illness will be assessed as clinically indicated in accordance with accepted professional judgment.
- c. Psychotropic medication shall be used only in accordance with accepted professional judgment. New Lisbon shall ensure that no resident receives psychotropic medication without an accompanying behavior program unless it is documented by the appropriate professionals that the resident has not benefitted from a behavior program.

- d. New Lisbon shall provide adequate behavioral and other data to psychiatrists to better facilitate adequate and appropriate psychiatric treatment for each person.
- e. Psychiatric services shall be developed and implemented in close collaboration with New Lisbon's psychologists so as to provide coordinated behavioral care.
- f. New Lisbon shall have a qualified professional monitor the effectiveness of all psychiatric treatments including the use of psychotropic medications on a quarterly basis and revise the treatment regimen in a timely manner whenever appropriate.

5. Habilitation

- a. New Lisbon's interdisciplinary teams shall identify the individual needs, preferences and interests of each resident and develop strategies to address these needs and preferences in an integrated fashion. Based on this information, New Lisbon shall develop and implement a comprehensive interdisciplinary plan for the provision of training, services and supports to meet the needs of the residents.
- b. New Lisbon shall provide adequate and appropriate training to staff on how to implement the plans and monitor implementation of the plans. New Lisbon shall certify that each staff member receiving such training has demonstrated the ability to implement the plan. New Lisbon shall continue

to implement an adequate system to revise the residents' plans, whenever necessary, to meet the needs of each resident.

- c. New Lisbon shall provide an adequate and appropriate assessment of all residents' vocational and/or day programming needs. Recommendations from the assessment will be incorporated into each resident's plan.
- d. New Lisbon shall provide residents with day programming or vocation/employment opportunities to meet the residents' individualized needs to the extent that these opportunities can be reasonably developed in and around New Lisbon.
- e. New Lisbon shall provide individualized habilitation and develop additional training and behavior programs for the residents.

6. Health Care

- a. New Lisbon shall provide routine, chronic, and emergency seizure management to all individuals with a seizure disorder at New Lisbon in accordance with accepted professional judgment.
- b. New Lisbon shall continue to ensure that all residents with seizure disorders have assessments, implemented plans of care, and ongoing monitoring to meet the residents' individualized needs in accordance with accepted professional judgment.
- c. New Lisbon shall place an emphasis on providing assessments and treatments for those residents with high-risk conditions such as risk for bowel obstructions in accordance with accepted professional judgment.

- d. New Lisbon will provide ongoing follow-up and monitoring of the treatment plan to determine if it is working as intended and revise the plan as needed.
- e. New Lisbon shall continue to employ sufficient physicians to meet residents' needs in accordance with accepted professional judgment.

7. Nutritional and Physical Management and Therapy Services

- a. New Lisbon shall implement policies and protocols to provide each resident with adequate and appropriate nutritional and physical management in accordance with accepted standards of care.
- b. New Lisbon shall continue to identify each resident who has a nutritional management problem, including dysphagia, difficulty swallowing, chewing, or retaining food and/or liquids.
- c. New Lisbon shall continue to have an interdisciplinary team comprehensively assess each such resident's nutritional management needs.
- d. New Lisbon shall continue to address adequately each resident's nutritional management needs including providing sufficient mealtime supports.
- e. New Lisbon shall develop and implement a system to regularly monitor the progress of residents with nutritional management difficulties to ensure that staff is implementing nutritional management plans correctly and that plans are modified as necessary, in a timely manner and in accordance with accepted professional judgment.
- f. New Lisbon shall continue to provide each resident with adequate and appropriate physical and occupational therapy services, communication

services and physical management in accordance with accepted professional judgment. New Lisbon shall provide adequate and appropriate training to staff to utilize safe and proper handling/transfer techniques for residents. New Lisbon shall certify that each staff member receiving such training has demonstrated the ability to implement the techniques. New Lisbon shall develop and implement an appropriate system to monitor the staff implementation of the techniques.

8. Community Placement

- a. In accordance with Title II of the ADA, 42 U.S.C. § 12132, and implementing regulation 28 C.F.R. § 35.130, the State shall ensure that each New Lisbon resident is served in the most integrated setting appropriate to meet each resident's needs.
- b. To that end, the State shall comply with Olmstead v. L.C., 527 U.S. 581 (1999) and Third Circuit case law, and shall provide community-based treatment for New Lisbon residents when:
 - i. the State's treatment professionals have determined that community placement is appropriate based on a reasonable assessment of each resident;
 - ii. the transfer from institutional care to a less restrictive setting is not opposed by the affected resident; and

- iii. the placement can be reasonably accommodated, taking into account the State's resources as defined by Olmstead and Third Circuit case law.

E. Compliance Monitor

1. Elin Howe shall be appointed as the Compliance Monitor (“Monitor”) who shall, as set forth below, monitor and report on the State's substantial compliance or non-compliance with all provisions in Part D of this Agreement. The Monitor shall be permitted to utilize the services of up to four independent consultants in any area related to the provisions in Part D of this Agreement, if the Monitor deems such independent consultants necessary. The identities of such consultants shall be determined by the Monitor, but the State and the United States shall have the right to reject any of the Monitor’s proposed consultants prior to Monitor retaining any such consultant.
2. The parties and the Monitor have agreed to the monitoring protocol and budget annexed hereto as Exhibit A. All monitoring shall be done in accordance with the Monitoring Protocol.
3. The State shall bear all costs of the Monitor and his or her consultants. The costs for the Monitor and his or her consultants shall not exceed \$200,000.00 per year. If the Monitor needs additional resources to investigate a death caused by alleged abuse, neglect or improper care, the Monitor will provide written notice to the parties and the State agrees to pay all of the Monitor’s reasonable requests for costs, but the reasonable costs shall not exceed \$50,000.00 per year.

4. The United States does not concede that the use of the words “continue to” in Part D of this Agreement implies that the State has already been meeting the residents’ needs in each area. However, the parties mutually agree that the Monitor shall have the authority to determine whether the changes the State has made have brought it into substantial compliance with this Agreement, and if so, the time at which substantial compliance began.
5. The Monitor and his or her consultants shall tour New Lisbon once every six months and issue a written report 45 days after the end of each review. All written reports shall include findings of substantial compliance or non-compliance with respect to each provision in Part D of the Agreement.
6. In the event of the death of a resident caused by alleged abuse, neglect or improper care at New Lisbon, New Lisbon will report the death to the Monitor within 5 business days of the incident and provide an investigation report with the results of New Lisbon’s investigation to date. New Lisbon’s report will also include what, if any, additional information is necessary for a final conclusion. If, after reviewing New Lisbon’s investigative report, the Monitor believes that the death is related to a lack of compliance with a provision in Section D of this Agreement, then the Monitor may conduct an additional review, in addition to the tours referred to in paragraph E(5), prior to the next scheduled tour. If the Monitor elects to conduct an additional review pursuant to this Paragraph, the Monitor will give reasonable notice of the additional review to the parties. The scope of the additional review shall be limited to Section D of the Agreement.

7. If the Monitor determines that the State is not in substantial compliance with a provision in Part D, the Monitor shall so state in its written report and provide the factual basis for the findings, including, as appropriate: identification of residents involved; dates and times of incidents; and/or care, treatment, or services at issue and a summary specifying the documents and records the Monitor reviewed and the interviews the Monitor conducted that support the Monitor's determination.
8. If the Monitor determines that the State is in substantial compliance with all provisions of a Section in Part D, the Monitor shall so state and provide the factual basis for the findings, including a summary specifying the documents and records the Monitor reviewed and the interviews the Monitor conducted that support the Monitor's determination. If the Monitor determines that the State is in substantial compliance with all provisions of a Section in Part D, the Monitor shall cease monitoring and reporting on that section for the remaining term of this Agreement.

F. Termination

1. Subject to the other provisions in this Section, this Agreement shall automatically terminate four years from the date the Complaint, Agreement, and a Fed. R. Civ. P. 41 Notice of Dismissal is filed with the Court, without the need for any action on behalf of any party. The parties agree that no court or other tribunal shall have the power to extend the Agreement past the four-year automatic termination date. The Agreement may be extended beyond the four-year term only with the written mutual agreement of all parties.

2. If, prior to the expiration of the four-year term, the Monitor determines that the State is in substantial compliance with all provisions within a section in Part D of this Agreement, then the Monitor shall cease monitoring and reporting on that section for the remaining term of this Agreement. The United States shall have the right to conduct an onsite review (including the right to tour, inspect and copy documents, interview staff and residents, and physically inspect the facility) to verify the Monitor's finding of substantial compliance regarding any section(s) at its expense and at a mutually agreeable time within 90 days after the Monitor issues his or her report. The United States may bring clinical experts in a relevant area to assist with the onsite review.
3. If at any time during the term of this Agreement, either the United States or the State becomes concerned that the Monitor has failed to meet his/her obligations or has failed to apply the appropriate standard in determining compliance under this Agreement that party shall utilize the following procedure:
 - a. The party concerned about the Monitor shall notify the other party in writing of the concern and the reason for such concern. From the date of the written notice, the Monitor shall cease all monitoring activities until the concern is resolved.
 - b. If within 10 days of the written notice the parties cannot resolve the concern the parties agree:
 - i. to mediate the concern;

- ii. to use the services of the first available Mediator on the pre-approved list of Mediators attached to this Agreement as Exhibit B. The party requesting mediation shall bear the cost of the mediation; and
 - iii. that the Mediator shall work with the parties to resolve the concern for a period of 30 days. If the Mediation is unsuccessful within 30 days, the Mediator shall make a written, binding determination as to the concern within 30 days. The parties agree that the Mediator's binding decision shall not be appealable to the Court.
 - c. The parties agree that in the event that the parties or the Mediator determines that the Monitor should be replaced, the parties shall mutually agree on the identity of the replacement Monitor.
 - d. The parties agree that the term of this agreement shall be tolled for the period of time from the written notice of the concern until the point at which the concern is amicably resolved, the Mediator issues a written, binding determination as to the concern, and/or the parties to agree on the identity of the new Monitor, as applicable and as set forth infra. The parties agree that any tolling time shall be added on to the term of the Agreement.
4. During the term of this Agreement, New Lisbon shall provide timely notice of all resident deaths, and copies of completed death investigations or mortality and morbidity reviews as appropriate, to the United States and the Monitor. If the United States has cause to believe that the State's non-compliance with this Agreement threatens the immediate health and safety of the residents, the United States shall

immediately notify the State and the Monitor of the specific provisions of this Agreement that it believes has been violated and the facts upon which this allegation is based. The State shall provide the United States with reasonable access to New Lisbon to investigate the immediate health and safety risk. In this situation, the United States shall have the right to move and the State has the right to oppose that the Court should reopen or reinstate this litigation.

- a. If the United States files such a motion, the Agreement shall terminate with regard to that section as of the filing date of the motion, but the remaining sections of the Agreement continues in full force and effect.
 - b. If under this subsection of the Agreement, two more sections of Agreement are terminated, either at one time, or at different times, the State shall have the right to terminate this Agreement in its entirety, by giving written notice to the United States. In such an event, the United States may take whatever action it deems necessary to enforce the constitutional and statutory rights of the residents of New Lisbon.
5. At any time during the last six months of this Agreement, the United States shall have access, at a mutually agreed upon time, to conduct a compliance review (including the right to tour, inspect and copy documents, interview staff and residents, and physically inspect the facility), if necessary, of all the sections of the Part D of the Agreement that remain in force at that time.

6. If the State has fully complied with all of the provisions in Part D of this Agreement at the end of the four-year term or before, the Agreement shall terminate and the United States agrees not to reopen the lawsuit on any issue addressed in the findings letter dated April 8, 2003.
7. At the expiration of four years, if the Monitor determines the State has not substantially complied with the provisions in Part D of this Agreement, the Agreement shall still terminate unless the parties mutually agree in writing to extend this Agreement. After termination, the United States may take whatever action it deems necessary to enforce the constitutional and statutory rights of the residents of New Lisbon.

G. Enforcement

1. The State and the United States agree that this is a mutually binding agreement.
2. Neither the State nor the United States shall challenge the validity of this Agreement on the ground that the signatories hereto lack the authority or capacity to contract or the ground that the Agreement is not supported by adequate consideration.

AGREED TO BY THE UNDERSIGNED:

FOR THE STATE:

PETER C. HARVEY
Attorney General of New Jersey

by: _____
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EXHIBIT A

MONITORING PROTOCOL

The United States, the State of New Jersey and Elin Howe in her capacity as the Monitor as specified in the Settlement Agreement, captioned:

United States of America, Plaintiff, v. the State of New Jersey; James E. McGreevey, Governor of the State of New Jersey; James Davy, Commissioner, Department of Human Services; Division of Developmental Disabilities; Jeffrey Schroeder, Chief Executive Officer, New Lisbon Developmental Center, Defendants,

hereby agree that all monitoring called for in the Settlement Agreement, shall be conducted pursuant to the following terms and conditions:

I. Application of Settlement Agreement

- A. Pursuant to Part E of the Settlement Agreement (“Agreement”) between the United States and the State of New Jersey, attached hereto as Exhibit A to this protocol, the Monitor shall monitor and report on the State's substantial compliance or non-compliance with all provisions in Part D of the Agreement at New Lisbon Developmental Center (“New Lisbon”).
- B. All monitoring shall be done in accordance with this Monitoring Protocol (“Protocol”) and the Agreement.
- C. To the extent that the Protocol and the Agreement are inconsistent to one another, all monitoring shall take place in accordance with the Agreement.

II. Monitor’s Consultants

- A. The Monitor shall be permitted to utilize the services of up to four independent consultants per monitoring visit with expertise pertaining to any area of the different areas of specialty included in Part D of the Agreement to assist with the monitoring, if the Monitor deems such consultants necessary. The identities of such consultants shall be determined by the Monitor prior to any monitoring visit, with notice to the State and the United States, and the State and the United States shall have the right to reject any of the Monitor’s proposed consultants prior to the monitoring visit.
- B. The Monitor may discontinue the use of any consultant at any time as he or she deems necessary and appropriate and shall so notify the State and the United States. If the Monitor wishes to retain a replacement consultant, the Monitor may do so prior to any monitoring visit, but the State and the United States shall have the right to reject any of the Monitor’s proposed consultants prior to the monitoring visit.

III. Budget and Payment

- A. Pursuant to Part E(3) of the Agreement, the costs for the Monitor and his or her consultants, including all expenses, shall not exceed \$200,000.00 per fiscal year (July 1 to June 30). The \$200,000.00 budget shall include all travel costs and other expenses. If the Monitor needs additional resources to investigate a death caused by alleged abuse, neglect or improper care, the Monitor will provide written notice to the parties and the State agrees to pay all of the Monitor's reasonable requests for costs, but the reasonable costs, including all travel costs and other expenses, shall not exceed \$50,000.00 per year. Any funds not used any fiscal year will not carry forward to the next year.
- B. The State will arrange for payment of all Monitoring costs upon presentment of monthly, itemized invoices from the Monitor. Travel costs for the Monitor and her consultants shall be reimbursed consistent with State and Federal per diem rates and guidelines. The Monitor agrees to provide any and all additional documentation requested by the State in order to facilitate payment to the Monitor.

IV. Monitoring Visits:

A. Regular Monitoring Visits:

Monitoring shall occur in accordance with Part E(5) of the Agreement, two times per year at approximately 6 month intervals and shall be arranged for dates and at times mutually agreeable to the State and the Monitor. The first visit will occur within 30 days of execution of the Settlement Agreement. The State shall not unreasonably fail to agree on the time for Monitor visits.

- 1. The Monitor will make every reasonable effort to have the monitoring visit by her and her consultants occur on the same days. The Monitor will make every reasonable effort to have the monitoring visit occur on consecutive days. Should circumstances arise such that either or both are not possible, the Monitor shall notify all parties and shall work with the State to arrange for the on-site visits at mutually convenient times not to exceed 7 days in a 14 day period.

B. Additional Monitor Visit:

Pursuant to Part E(6) of the Agreement, in the event of the death of a resident caused by alleged abuse, neglect or improper care at New Lisbon, New Lisbon will report the death to the Monitor within 5 business days and provide an investigation report

with preliminary findings. New Lisbon's report will also include what, if any, additional information is necessary for a final conclusion. Based on New Lisbon's report, and in addition to the tours referred to in Part E(5) of the Agreement, the Monitor may conduct an additional review prior to the next scheduled review. The scope of the review, including whether document review, in-person or telephone interviews, and/or on-sight visit are necessary, shall be in the Monitor's discretion.

1. If the monitor elects to conduct an additional review pursuant to this Paragraph, the monitor will give reasonable notice of the additional review.
2. The scope of the additional review shall be limited to Part D of the Agreement.

C. Components of Monitoring Visits

1. Matters inquired into during any such monitoring visit, interview or review of records or other documents shall be limited to matters directly addressed in Part D of the Agreement.
2. These monitoring visits may include the following, as the Monitor determines is necessary:
 - a. on-site inspection of New Lisbon;
 - b. interviews with staff, contractors and residents.
 - i. The Monitor will work with New Lisbon to arrange interviews with staff at mutually agreeable times, in an effort not to disrupt the operation of New Lisbon.
 - ii. The State may have an NLDC or DDD representative present for any interview with staff or contractors unless the Monitor, in her discretion, believes that the presence of a such representative would be detrimental to the Monitor or her consultant's interview with staff or contractors.
 - iii. Any staff member who is a member of a collective bargaining unit, consistent with the contract between the collective bargaining unit and the state, may have a representative present at any interview.
 - iv. A representative of NLDC Quality Management or Executive Staff or of DDD's Office of Program Support shall be

allowed to participate in all interviews with residents unless the Monitor, in her discretion, believes that the presence of such a representative would be detrimental to the resident or to the Monitor's or her consultant's interview with the resident.

- v. A resident may shall be offered the opportunity to have a representative of his or her own be present at any interview and such a request shall be honored by the NLDC and the Monitor and/or consultant.
- c. review of New Lisbon documents, including resident records as determined by the Monitor to be relevant to its monitoring and review under this Settlement Agreement subject to the following conditions:
- i. Immediately prior to and during any monitoring evaluation, the Monitor shall be permitted to request copies of documents and records he/she determines to be relevant to its review under applicable provisions of the Agreement.
 - ii. If a request is submitted prior to the inspection the request shall be in writing and the State shall provide the documents to the Monitor within 15 days of the written request or as soon as is practicable based on the size and scope of the request.
 - iii. If the request is made during the inspection, the State shall provide copies within 15 days. If it takes New Lisbon longer than 15 days to provide the Monitor the requested copies, then the Monitor's deadline for producing her report, pursuant to Section V(A) of this Protocol, will be tolled an equal number of days.
 - iv. The United States, upon notice to the State, may request that the Monitor forward copies of any documents obtained from NLDC to the United States.
 - v. The State retains the right to object to a document request based on privilege or because the documents are not relevant to evaluating compliance with Section D of the Settlement Agreement. If the State makes such an objection, it shall notify the Monitor and United States in writing and explain the basis for its objection.

V. Monitoring Report

- A. Thirty (30) days after the end of each review, the Monitor shall provide the parties with a draft of the written report. Immediately following the issuance of the draft report, the parties and the Monitor shall have a conference call to discuss the findings in the report and to correct any errors that might exist in the report. Pursuant to Part E(5) of the Agreement, the Monitor shall issue a final written report 45 days after the end of each review, unless the time is tolled pursuant to Section IV(C) of this Protocol. All written reports shall include findings of substantial compliance or non-compliance with respect to each provision in Part D of the Agreement.
 - 1. Following an additional monitoring visit as provided for in Part E(6) of the Agreement and Section IV(B) of the Protocol, the Monitor shall issue a final written report no later than 45 days after the additional monitoring visit, summarizing the findings regarding the death and determining whether the death was caused by the State's non-compliance with the Agreement.
- B. Pursuant to Part E(7) of the Agreement, if the Monitor determines that the State is not in substantial compliance with a provision in Part D, the Monitor shall so state in its written report and provide the factual basis for the findings, including, as appropriate: identification of residents involved; dates and times of incidents; and/or care, treatment, or services at issue and a summary specifying the documents and records the Monitor reviewed and the interviews the Monitor conducted that support the Monitor's determination.
- C. Pursuant to Part E(8) of the Agreement, if the Monitor determines that the State is in substantial compliance with all provisions of a section in Part D, the Monitor shall so state and provide the factual basis for the findings, including a summary specifying the documents and records the Monitor reviewed and the interviews the Monitor conducted that support the Monitor's determination. If the Monitor determines that the State is in substantial compliance with all provisions of a Section in Part D, the Monitor shall cease monitoring and reporting on that section for the remaining term of this Agreement.
 - 1. The United States shall have the right to conduct an onsite review (including the right to tour, inspect and copy documents, interview staff and residents, and physically inspect the facility) of the Monitor's finding of compliance regarding any section(s) at their expense and at a mutually agreeable time within 90 days after the Monitor issues his or her report. The United States may bring clinical experts in relevant areas to assist with the onsite review.

- D. If a member of the public requests from a party a copy of the Monitor's final report(s), the party shall provide notice to the Monitor and the other party. Either party may object to the release of the report and seek a protective order for all or some of the information based on privilege to state or federal confidentiality provisions. If the other party does not seek a protective order, after 20 days, the party may release the report(s) to the member of the public. Other than in response to a request from a member of the public, a party may release or disclose a final report subject to the express written consent of the other party and/or the monitor. The parties may not release reports that have not been made final pursuant to Section V(D). of this Protocol.

VI. Contact with Monitor by Either Party

- A. The Monitor shall make him or herself and the consultants available for an ex parte meeting or conference call with either party within a reasonable time from a request for any such meeting or call. Following the ex parte meeting or conference call, the Monitor may only inform the other party generally of the subject matter of the ex parte meeting or conference call, if the Monitor believes such notification would be beneficial to the monitoring process.

VII. Disputes Regarding the Monitor

- A. Pursuant to Part F(3) of the Agreement, if at any time during the term of the Agreement, either the United States or the State becomes concerned that the Monitor has failed to meet his/her obligations or has failed to apply the appropriate standard in determining compliance under this Agreement that party shall utilize the following procedure:
1. The Party concerned about the Monitor shall notify the other party in writing of the concern and the reason for such concern. From the date of the written notice, the Monitor shall cease all monitoring activities until the concern is resolved.
 2. If within 10 days of the written notice the parties cannot resolve the concern the parties agree:
 - i. to mediate the concern;
 - ii. to use the services of the first available Mediator on the pre-approved list of Mediators attached to this Agreement as Exhibit B. The party requesting mediation shall bear the cost of the mediation; and

- iii. that the Mediator shall work with the parties to resolve the concern for a period of 30 days. If the Mediation is unsuccessful within 30 days, the Mediator shall make a written, binding determination as to the concern within 30 days. The parties agree that the Mediator's binding decision shall not be appealable to the Court.
 - 3. The parties agree that in the event that the Mediator determines that the Monitor should be replaced, the parties shall mutually agree on the identity of the replacement Monitor.
 - 4. The parties agree that the term of the Agreement shall be tolled for the period of time it takes to either amicably resolve the issue, the Mediator to issue a written, binding determination, or for the parties to agree on the identity of the new Monitor, as applicable and as set forth infra. The parties agree that any toling time shall be added on to the term of the Agreement.
- B. Pursuant to Part F(4) of the Agreement, during the term of the Agreement, New Lisbon shall provide timely notice of all resident deaths, and copies of completed death investigations or mortality and morbidity reviews as appropriate, to the United States and the Monitor.

VIII. Modification

Any of the provisions of the Protocol that do not appear in the Agreement may be modified with the written consent of the United States, the State, and the Monitor.

Agreed to by the undersigned:

FOR THE STATE:

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SHANETTA Y. CUTLAR

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EXHIBIT B

**Settlement Agreement Between the United States and New Jersey
concerning New Lisbon Developmental Center**

Pre-approved List of Mediators

To be used pursuant to Part (F) of the Settlement Agreement.

1. Daniel J. O'Hern
2. Margaret L. Shaw
3. Stewart G. Pollock
4. Roger M. Deitz